

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
STEVEN AND JUDITH KIRKPATRICK : DETERMINATION
DTA NO. 830077
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code :
for the Year 2015.

Petitioners, Steven and Judith Kirkpatrick, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the year 2015.

A videoconferencing hearing via CISCO Webex was held before Barbara J. Russo, Administrative Law Judge, on May 20, 2022, at 10:30 a.m., with the final brief to be submitted by September 2, 2022, which date began the six-month period for the issuance of this determination. Petitioners appeared pro se by Steven Kirkpatrick. The Division of Taxation appeared by Amanda Hiller, Esq. (Maria Matos, Esq., of counsel).

ISSUE

Whether petitioners have established that petitioner Steven Kirkpatrick qualifies as a real estate professional.

FINDINGS OF FACT

1. Petitioners, Steven and Judith Kirkpatrick, jointly filed a New York resident personal income tax return (form IT-201) for the year 2015 (2015 return), reporting their address as 66 Edgecombe Avenue, New York, New York. Petitioners' 2015 return reflects wage income in

the amount of \$581,456.00, federal adjusted gross income of \$509,606.00, and New York State adjusted gross income of \$506,013.00.¹ On line 11 of the 2015 return, petitioners claimed a deduction of \$72,480.00 from rental real estate activities. Line 11 of the 2015 return instructs the filer to “submit copy of federal Schedule E, Form 1040.” The copy of the 2015 return in the record does not have schedule E attached.

2. The Division of Taxation (Division) conducted an audit of petitioners’ return to determine whether either petitioner qualified as a real estate professional and whether they were entitled to the claimed deduction. By letter dated December 4, 2018, the Division requested that petitioners provide additional information regarding the rental real estate loss claimed for tax year 2015. The letter stated, in part:

“We need additional information about the rental real estate loss you claimed for the tax year above. It appears that you may not be entitled to claim the full amount of the loss.

Generally, rental real estate activities are considered to be passive. You may only claim losses from passive activities up to the amount of passive income on your return. Any unused passive loss from rental real estate is carried forward to the next tax year.

Some exceptions that allow rental real estate losses to offset nonpassive income include:

Special allowance based on modified adjusted gross income

If you actively participated in a rental real estate activity, you may be able to deduct your rental loss or the special allowance, whichever is less.

Real estate professional.

If you meet all IRS requirements to be considered a real estate professional, rental real estate losses are considered nonpassive and are not limited.

Qualifying disposition

If you sold the rental property to an unrelated party in a fully taxable event, all

¹ Form W-2 Wage and Tax Statements attached to petitioners’ return indicates that Steven Kirkpatrick received wages from Belkin Burden Wenig & Goldman LLP in the amount of \$362,543. and that Judith Kirkpatrick received wages from Tishman Speyer in the amount of \$142,448.00 and from TIAA in the amount of \$76,465.00.

current and carryover losses are deductions.

Send us:

- Completed Form DTF-973.1-A, Federal Schedule E Rental Real Estate Loss Questionnaire.
- All applicable supporting documentation.”

3. By correspondence dated December 26, 2018, petitioners responded to the Division’s request for information and provided a copy of their 2015 federal schedule E and form 8582, passive activity loss limitations.

Petitioners responded “yes” to question 1 on the federal schedule E rental real estate loss questionnaire (Questionnaire), which asks “Did you meet the real estate professional qualifications, as set forth in Internal Revenue Code section 469(c)(7)?” The Questionnaire further states:

“If Yes, send us the following documentation. If you are married, be sure to include this information for both you and your spouse:

- A description of your occupation that is not related to your rental real estate activities
- The total number of hours worked in that occupation during the tax year
- A list of services performed for each rental property and hours attributable to those services
- Appointment books, calendars, narrative summaries, or any other records to support those hours
- If you elected to group your rentals as one activity, send a copy of the election”

In the correspondence, Mr. Kirkpatrick stated, in part:

“The number of rental units at each property in 2015 was as follows: 24 Fulton Street – 4, 66 Edgecombe – 11, 175 Central – 1. The units were rented on various days, as more fully set forth on the Schedule E form, with 24 Fulton Street being rented year round, 66 Edgecombe being rented for storage purposes, and 175 Central Avenue being rented for a portion of the year as a

vacation/summer rental although available for rent year round. I personally managed and was responsible for the maintenance of all properties, which included advertising, taking rental applications, preparing lease and rental

documents, overseeing repairs and maintained [sic], research record keeping and legal compliance work. I did not employ any outside property manager, and did everything relating to management of the properties myself. I spent an average of 20 hours a week on work relating to the properties, and management thereof, and elected to group the rentals into one activity. My occupation not relating to my rental real estate activities is a real estate attorney, and I worked approximately 2,000 hours in that occupation.”

Petitioners did not include any substantiating documentation with the correspondence.

4. Petitioners’ 2015 federal schedule E reports the following information:

Physical Address of Property	Fair Rental Days	Personal Use Days
24 Fulton St, Weehawken NJ	365	0
66 Edgecombe Ave, New York, NY	1	0
175 Central Ave, Greenport, NY	365	0

Petitioners reported the following income and expenses on the 2015 schedule E, resulting in reported net real estate losses of \$72,480.00:

	24 Fulton St	66 Edgecombe Ave	175 Central Ave
Income:			
Rents Received	\$64,440.00	\$100.00	\$34,212.00
Expenses:			
Cleaning & maintenance	\$3,616.00		\$7,300.00
Insurance	\$4,918.00		\$5,607.00
Mortgage Interest	\$32,832.00	\$549.00	\$17,119.00
Repairs	\$2,204.00		
Supplies	\$737.00		\$1,350.00
Taxes	\$18,759.00	\$2,443.0	\$6,818.00
Utilities	\$4,307.00	\$1,509.00	\$2,733.00
Depreciation	\$19,180.00	\$20,245.00	\$18,182.00
Other	\$699.00	\$140.00	
Total Expenses	\$87,247.00	\$24,876.00	\$59,109.00

5. On January 18, 2019, the Division issued a statement of proposed audit changes (Statement) denying the claimed deductions and calculating tax due in the amount of \$9,480.47

plus interest. The Statement explained, in part, as follows:

“We have reviewed the information you sent in response to our inquiry letter regarding the rental real estate loss claimed on your 2015 tax return.

The documentation submitted is not sufficient for us to determine if you qualify as a real estate professional and materially participated in the rental activity. We would require a daily hour log or calendar for the personal activities performed by each individual on each rental property during the tax year in question.

In order for hours worked as an employee in a real estate trade or business to count toward the real estate professional qualifications, you must be at least 5% owner of that business.

Since you have not verified that you qualify as a real estate professional, and your MAGI is greater than \$150,000.00, the rental real estate loss claimed on line 26 of your federal schedule E is considered passive, and subject to the passive activity loss (PAL) rules. The PAL rules state that losses from passive activities are limited to any passive income and cannot offset non-passive income.

Based on your federal schedule E, you had no net passive income reported. Therefore, the passive rental loss has been disallowed in full. Any unused or disallowed passive loss can be carried forward to the following tax year on Form 8582.”

6. Petitioners sent correspondence to the Division indicating their disagreement with the Statement.² In the correspondence, Mr. Kirkpatrick stated, in part, that “[a]fter reviewing my records, it turns out that the time that I spent was significantly greater than [sic] I originally estimated and stated” and estimated that he spent 400 hours for the 24 Fulton Street property, 725 hours for the 66 Edgecombe property, and 320 hours for the 175 Central property in 2015. Mr. Kirkpatrick further stated that he also spent an average of five to seven hours a week doing market research, speaking with brokers and evaluating other properties for purchase. Mr. Kirkpatrick concluded in the correspondence that he spent at least 1,695 hours performing duties relating to the management of properties currently owned and managing his real estate business

in 2015.

7. On April 5, 2019 the Division issued a notice of deficiency, notice number L-049375081, asserting tax due for the year 2015 in the amount of \$9,480.47 plus interest (notice).

8. During the hearing in this matter, the Division introduced into the record correspondence dated July 6, 2020 and submitted by petitioners during proceedings with the Division’s Bureau of Conciliation and Mediation Services (BCMS). In this correspondence, Mr. Kirkpatrick estimated that he spent 540 hours working for the 24 Fulton Street property, 725 hours for the 66 Edgecombe Avenue property, and 310 hours for the 175 Central property in 2015. He further estimated an additional 200 hours of time traveling to the 175 Central Avenue property and contended that such hours should be included when calculating the amount of time spent managing the property. Mr. Kirkpatrick further stated that he also spent an average of four to six hours a week doing market research, speaking with brokers and evaluating other properties for purchase in 2015. He concluded that, “during calendar year 2015, I spent at least 1,575 hours personally performing duties for the management of my three properties, not including travel time or market research time. When these additional times spent are added (200 hours travel time and 250 for market research), the time spent performing the duties of a real estate professional increased to 2025 hours.”

Petitioners included a copy of a 2015 calendar with the correspondence. The calendar contains references to certain properties as follows:

Date	Time	Description
Saturday 1/3/15	9:00 a.m.	“Greenport”
Sunday 1/11/15	10:00 a.m. – 5:00 p.m.	“Greenport”
Saturday 1/24/15	10:00 a.m. (no end time indicated but another	“Greenport”

² The correspondence is dated February 8, 2018, but such date is a typographical error and should be February 8, 2019.

	event scheduled at 4:00 p.m.)	
Sunday 2/1/15	9:00 a.m. (no end time indicated but another event scheduled at 6:30 p.m.)	“Greenport”
Tuesday 2/3/15	3:00 p.m.	“66 Edgecombe meeting”
Saturday 2/14/15	12:00 p.m.	“Greenport meeting”
Saturday 2/21/15	9:00 a.m.	“Greenport”
Sunday 3/1/15	10:30 a.m.	“Greenport meeting”
Saturday 3/21/15	9:00 a.m.	“Greenport”
Saturday 3/28/15	12:00 p.m.	“Greenport”
Saturday 4/4/15	10:30 a.m.	“Greenport”
Sunday 4/12/15	9:30 a.m.	“Greenport”
Saturday 4/18/15	12:00 p.m.	“Greenport”
Sunday 4/26/15	11:00 a.m.	“Greenport”
Sunday 5/3/15	3:00 p.m.	“Greenport”
Sunday 5/10/15	11:00 a.m.	“Greenport”
Saturday 5/30/15	4:00 p.m.	“Greenport meeting”
Saturday 6/13/15	10:00 a.m. (no end time indicated but another event scheduled at 8:00 p.m.)	“Greenport”
Sunday 6/21/15	11:30 a.m.	“Greenport”
Saturday 6/27/15	9:30 a.m. (no end time indicated but another event scheduled at 6:00 p.m.)	“Greenport”
Saturday 7/11/15	10:30 a.m. (no end time indicated but another event scheduled at 7:30 p.m.)	“Greenport”
Monday 7/13/15	11:30 a.m. (no end time indicated but another event scheduled at 4:00 p.m.)	“Appraisal Inspection 66 Edgecombe”
Sunday 7/19/15	12:00 p.m.	“Greenport”
Sunday 8/2/15	10:00 a.m.	“Greenport”
Saturday 8/15/15	11:30 a.m. (no end time indicated but another event scheduled at 6:00 p.m.)	“Greenport”
Saturday 8/22/15	12:30 p.m.	“Greenport”
Sunday 8/30/15	10:00 a.m.	“Greenport”
Saturday 9/5/15	10:00 a.m. (no end time indicated but another event scheduled at 5:00 p.m.)	“Greenport”
Sunday 9/13/15	10:00 a.m. (no end time indicated but another event scheduled at 12:00 p.m.)	“Greenport”
Saturday 9/26/15	2:00 p.m. (no end time indicated but another event scheduled at 6:30 p.m.)	“Greenport”
Sunday 10/18/15	2:00 p.m.	“Greenport”
Saturday 10/24/15	9:00 a.m. (no end time indicated but another event scheduled at 6:00 p.m.)	“Greenport”
Tuesday 10/27/15	9:30 a.m. (no end time indicated but another event scheduled at 10:30 a.m.)	“66 Edgecombe”
Sunday 11/1/15	10:00 a.m.	“Greenport”
Wednesday 11/4/15	11:00 a.m. (no end time indicated but another event scheduled at 2:00 p.m.)	“66 Edgecombe”

Thursday 11/12/15	10:00 a.m. (no end time indicated but another event scheduled at 6:00 p.m.)	“66-68 Edgecombe Ave site meeting”
Saturday 11/14/15	10:30 a.m. (no end time indicated but another event scheduled at 6:00 p.m.)	“Greenport”
Saturday 11/21/15	9:00 a.m.	“Greenport”
Saturday 11/28/15	10:30 a.m.	“Greenport”
Tuesday 12/1/15	9:30 a.m. (no end time indicated but another event scheduled at 10:30 a.m.)	“66 Edgecombe”
Sunday 12/6/15	10:30 a.m.	“Greenport”
Saturday 12/12/15	10:30 a.m.	“Greenport”
Saturday 12/19/15	10:00 a.m.	“Greenport”
Tuesday 12/22/15	4:00 p.m.	“66 Edgecombe”
Saturday 12/26/15	9:00 a.m.	“Greenport”

9. In 2015, Mr. Kirkpatrick worked full-time as a partner at the law firm of Belkin Burden Wenig & Goldman LLP. Mr. Kirkpatrick testified that he worked at the law firm approximately 40 hours per week or approximately 2000 hours in 2015.

10. As noted above, petitioners reported their residence as 66 Edgecombe Avenue, New York, New York on the 2015 New York resident return (*see* finding of fact 1). Mr. Kirkpatrick also “often lived” at the 24 Fulton Street property in 2015 and testified that:

“24 Fulton Street I was at the property every day. I often lived at that property. There was a unit at that property that I would stay in and so that’s why I was for the most part there every day.

There were days that I was at 66 Edgecombe that I stayed there as well. I did establish my primary residence - - the intent when buying that house was - - it’s not a house, it’s a building. It’s a brownstone type building that it - - you know I would be eventually living there. This was the longer term plan that this would be my residence and it would and it would also be a rental property and it’s for - - I you know, so I listed that I believe properly as my residence.

. . . . I lived for the most part at 24 Fulton Street at the time. I spent some time at 66 Edgecombe where I stayed at night.”

11. Mr. Kirkpatrick testified that in 2015 he was to sole owner of the 66 Edgecombe property, did not recall if he was the sole owner of the 175 Central Avenue property, and co-owned the 24 Fulton Street property.

12. Mr. Kirkpatrick testified that he performed real estate activities on weekends and after-hours, with the exception of occasions when he went to the building department during weekdays. He did not keep records or logs of the time he spent performing rental real estate activities on the properties in 2015. He testified regarding the activities he performed at the properties and estimated the time he spent performing such activities in 2015. According to Mr. Kirkpatrick, for the 24 Fulton Street property, he cleaned the inside hallways of the property at least once a week, cleaned the outside of the property, cut the grass and performed yard care, shoveled snow, performed garbage removal and tenant management. He testified that he spent about 540 hours performing these tasks for the 24 Fulton Street property.

Mr. Kirkpatrick testified that for the 66 Edgecombe Avenue property, he cleaned litter in front of the building “regularly,” put out garbage and recycling, performed cleaning and snow removal, and spent time doing demolition, renovation, and preservation work. He testified that he spent a minimum of 725 hours managing the Edgecombe Avenue property in 2015.

Regarding the 175 Central Avenue property, Mr. Kirkpatrick testified that such property was a two-to-three hour drive from his location and that he would go to the property on weekends. He testified that because of the distance, he was not as “hands on” for this property and he did not shovel or clean the sidewalks. Mr. Kirkpatrick testified that his activities were mainly supervising, dealing with rentals and requirements of the Village of Greenport including paperwork and permits, ordering oil for the boilers and heaters, and scheduling plumbers and other professionals. He testified that rentals for this property were marketed online through platforms such as “Air B&B” and “VRBO” and there were no leases in 2015. According to Mr. Kirkpatrick, he spent approximately 310 hours performing activities for the 175 Central Avenue property in 2015.

Mr. Kirkpatrick further testified that in addition to time spent on the three properties

listed on the schedule E, he spent “a minimum of 200, 250 hours, probably more” looking for additional properties to expand his real estate business.

CONCLUSIONS OF LAW

A. The question to be addressed in the present matter is whether petitioners are entitled to claim a deduction in tax year 2015 for real estate activities. “Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed” (*New Colonial Ice Co. v Helvering*, 292 US 435, 440 [1934]). The taxpayers bear the burden of demonstrating that they have met all the requirements necessary to be entitled to the claimed deductions (*see Moss v Commissioner of Internal Revenue*, 135 TC 365 [2010]).

B. Taxpayers are allowed deductions for certain business and investment expenses under Internal Revenue Code (IRC) (26 USC) §§ 162 and 212. Section 469 (a) of the IRC generally disallows any passive activity loss, defined as the excess of aggregate losses from all passive activities for the taxable year over the aggregate income from all passive activities for the year (*see* 26 USC § 469 [d] [1]). A passive activity is any trade or business in which the taxpayer does not materially participate (26 USC § 469 [c] [1]). For the purposes of section 469 and to the extent provided in regulations, a trade or business includes any activity with respect to which expenses are allowable as a deduction under 26 USC § 212 (26 USC § 469 [c] [6] [B]). Rental activity is usually treated as a per se passive activity regardless of whether the taxpayer materially participates (26 USC § 469 [c] [2], [4]). Material participation is defined as involvement in the operations of the activity that is regular, continuous, and substantial (26 USC § 469 [h] [1]).

C. An exception to the rule that a rental activity is per se passive is found in IRC (26 USC) § 469 (c) (7). If the taxpayer qualifies as a real estate professional, the taxpayer’s rental

real estate activity is treated as a trade or business subject to the material participation requirements of section 469 (c) (1) (*see* Treas Reg § 1.469 [e] [1]).

A taxpayer may qualify as a real estate professional if:

“(i) more than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates, and

(ii) such taxpayer performs more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates” (26 USC § 469 [c] [7] [B]).

Only time spent in those businesses in which the taxpayer materially participates count toward the requisite 750 hours. A taxpayer materially participates in an activity if he or she works on a regular, continuous and substantial basis in operations (26 USC § 469 [h] [1] [A] - [C]). In the case of a joint tax return, either spouse may satisfy both requirements for a real estate professional, but the requirements are satisfied only if either one separately satisfies such requirements (26 USC § 469 [c] [7] [B] [ii]).

The regulation at 26 CFR § 1.469-5T (f) (4) provides the types of proof to be used in determining the extent of an individual’s participation in an activity as follows:

“The extent of an individual’s participation in an activity may be established by any reasonable means. Contemporaneous daily time reports, logs, or similar documents are not required if the extent of such participation may be established by other reasonable means. Reasonable means for purposes of this paragraph may include but are not limited to the identification of services performed over a period of time and the approximate number of hours spent performing such services during such period, based on appointment books, calendars, or narrative summaries.”

D. As set forth above, in order to determine whether a taxpayer qualifies as a real estate professional, the inquiry begins with a description of a taxpayer’s occupation that is not related to the real estate activities. This analysis allows the Division to understand what a taxpayer’s primary employment involves on a day-to-day basis and, then, to view the claimed real estate

tasks and duties, in an effort to view a full picture of both income producing activities and determine if more than one-half of the personal services performed by the taxpayer are performed in real property trades or businesses.

Petitioners contend that Mr. Kirkpatrick qualified as a real estate professional in 2015, arguing that more than one-half of the personal services he performed in 2015 were in real estate activities. Mr. Kirkpatrick worked full-time as a partner with the law firm of Belkin Burden Wenig & Goldman LLP, working approximately 40 hours per week or 2000 hours in 2015. Thus, in order to qualify as a real estate professional, petitioners bear the burden of proving that Mr. Kirkpatrick spent more than 2000 hours performing personal services in real property trades or businesses in which he materially participated in 2015.

E. Petitioners have failed to meet their burden of proving the number of hours Mr. Kirkpatrick spent in real property trades or businesses in which he materially participated for the year at issue. While Mr. Kirkpatrick may have spent a significant amount of time on the properties listed on the schedule E, petitioners bear the burden of proof to substantiate the actual amount of time spent performing real estate activities, beyond the mere post-event estimates that were provided here.

While the regulations regarding the type of proof required to show a taxpayer's participation in a rental real estate activity are somewhat ambiguous and do not require contemporaneous daily time reports, logs, or similar documents *if* the extent of such participation is established by other reasonable means (*see* 26 CFR § 1.469-5T [f] [4]), courts have held that the regulations do not allow a post-event "ballpark guesstimate" (*see Moss v Commissioner of Internal Rev.*, 135 TC 365, 369 [TC 2010]; *Fowler v Commissioner of Internal Rev.*, 84 TCM

281 [TC 2002]; *Bailey v Commissioner of Internal Rev.*, 82 TCM 868 [TC 2001]; *Bailey v Commissioner of Internal Rev.*, T.C. Memo.2001–296; *Carlstedt v Commissioner of Internal Rev.*, T.C. Memo.1997–331; *Speer v Commissioner of Internal Rev.*, T.C. memo.1996–323; *Goshorn v Commissioner of Internal Rev.*, T.C. Memo.1993–578). For example, in *Bailey* (82 TCM 868), the court found that the taxpayer’s estimates of time spent on rental real estate activities were not reasonable where the taxpayer kept a daily calendar for the year in question that indicated the number of visits made to the rental properties, but the calendar did not quantify the number of hours that she spent on her rental activities. The taxpayer later attempted to summarize the activities that were noted in her calendar into a summary report, in which she generally explained the activities performed at the rental properties and provided an annual estimate of the hours spent on each rental property. The court found that the methods the taxpayer used to approximate the time that she spent performing these services were not reasonable within the meaning of 26 CFR § 1.469-5T (f) (4), because the estimates were uncorroborated and did not reliably reflect the hours that she devoted to her rental real estate activities. The court rejected the taxpayer’s “postevent [sic] ballpark guesstimates” in which she assigned hours to activities years later, and in preparation for trial, based solely on her judgment and experience as to how much time the activities must have taken her (*Bailey v Commissioner*).

Petitioners’ estimates of time spent on rental real estate activities here must likewise be rejected as mere post-event “ballpark guesstimates.” Mr. Kirkpatrick’s estimates of the time he spent on each property are varied and unreliable. He initially claimed during the audit that he spent an average of 20 hours a week on work relating to the properties (*see* finding of fact 3),

then significantly increased this estimate to 1,695 hours in response to the Division's Statement, and further increased the amount to 2025 hours during the BCMS proceedings. During the hearing in this matter, Mr. Kirkpatrick testified that he spent 1,575 hours on the three properties, plus an estimated "200, 250 hours, probably more" looking for additional properties to expand his real estate business. In their brief, petitioners argue that Mr. Kirkpatrick spent a total of 2025 hours in real estate activities in 2015, including 1,575 hours on the listed properties, plus 250 hours spent "doing market research, speaking with brokers and evaluating other properties for potential purchase [for] his personal real estate business" and 200 hours for travel time to the Central Avenue property.³

Mr. Kirkpatrick attempted to explain the inconsistencies, testifying that the estimates changed because "as requests were being made I continued to review documents to putting together information so that's the reason that the numbers changed as I sort of dug down and went through things." However, none of the "documents" petitioner claims he reviewed were presented into the record to corroborate his estimates. Indeed, the only documentary evidence presented in the record regarding Mr. Kirkpatrick's rental real estate activities is the calendar indicating entries on some dates for "Greenport" and for the Edgecombe Avenue property. The calendar does not quantify the number of hours Mr. Kirkpatrick spent on rental activities nor does it reflect each visit he claims to have made to the properties.

The credibility of Mr. Kirkpatrick's testimony is also questionable based on petitioners' schedule E, wherein they report "0" personal use days for each of the properties, including 66

³ Indeed, the unreliability of petitioners' ballpark guesstimates can be observed by comparing the total hours claimed in their brief with Mr. Kirkpatrick's testimony. Specifically, in the brief, petitioners' purport that 250 hours were spent looking to expand the real estate business, while Mr. Kirkpatrick's testimony was that he spent "200, 250 hours, probably more" on such activities. While petitioners' calculation assumes the higher end of this estimate (250), taking the lower end of the estimate from Mr. Kirkpatrick's testimony (i.e. 200) would put the total amount of hours allegedly spent on rental real estate activities at less than the amount of time Mr. Kirkpatrick spent

Edgecombe Avenue and 24 Fulton Street, despite reporting the Edgecombe Avenue property as their residence and despite Mr. Kirkpatrick's admission that 66 Edgecombe was his primary residence and that he also "lived for the most part" at 24 Fulton Street in 2015. Accordingly, petitioners' uncorroborated estimates of time spent on rental real estate activities are not reasonable and are insufficient to meet their burden of proof. Petitioners have therefore failed to establish that more than one-half of the personal services performed in trades or businesses by Mr. Kirkpatrick during the year at issue were performed in real property trades or businesses in which he materially participated. As such, he does not qualify as a real estate professional.

F. Even if petitioners' ballpark guestimates were found to be reasonable, Mr. Kirkpatrick's activities related to the Edgecombe Avenue property must be disregarded for purposes of determining whether he was a real estate professional because the Edgecombe property is not rental real estate as defined by 26 CFR 1.469-9(b) (3). Petitioners reported the Edgecombe Avenue property as their residence in 2015 and Mr. Kirkpatrick testified that it was his primary residence and that the long-term plan was for that property to be petitioners' residence. While he testified that the Edgecombe Avenue property would be their residence and "it would also be a rental property," his testimony failed to distinguish the amount of time spent working on the property for their residence, as opposed to the time spent working on it for rental activities, and failed to establish that the property was, in fact, rented out during the year at issue. It is well established that a taxpayer cannot deduct the expenses for renovating one's own personal residence as a business expense and the amount of time spent doing such cannot be including in the calculation of time spent for rental real estate activities for purposes of determining whether an individual is a real estate professional (*see Smith v Commissioner of*

Internal Rev., T.C. Summ. Op. 2014-13 [2014]).

Additionally, the evidence does not establish that the Edgecombe Avenue property was part of a real estate trade or business in 2015. Petitioners claimed in their response to the Division's audit inquiry that this property was rented for storage purposes (*see* finding of fact 3). On petitioners' 2015 schedule E, they reported "1" for fair rental days for the Edgecombe Avenue property and reported rents received on only \$100.00. Thus, based on their own reporting, the Edgecombe Avenue property is not "rental real estate" as defined by 26 CFR 1.469-9(b) (3). Rental real estate is defined as "any real property used by customers or held for use by customers in a rental activity within the meaning of section 1.469-1T(e)(3)." Section 1.469-1T (e) (3), Temporary Income Tax Regs., 53 Fed.Reg. 5702 (Feb. 25, 1988), states that, except as otherwise provided, an activity is a "rental activity" for a taxable year, if "during such taxable year, tangible property held in connection with the activity is used by customers or held for use by customers." As provided in section 1.469-1T (e) (3) (ii) (A), Temporary Income Tax Regs., an "activity involving the use of tangible property is not a rental activity for a taxable year if for such taxable year . . . [the] average period of customer use for such property is seven days or less" (26 CRR 1.469-1T [e] [3] [ii] [A]; *see Bailey v Commissioner. of Internal Rev.*, 82 TCM 868). Under New York law, "storage" means the provision of a place for the safekeeping of tangible personal property (*see* 20 NYCRR 527.6 [b] [2]). Since petitioners' reported storage rental was for only one day in 2015, such activity is not a rental activity and time spent for activities performed on the Edgecombe Avenue property may not be included in establishing compliance with the real estate professional test. Disregarding the 725 hours purportedly spent by Mr. Kirkpatrick on the Edgecombe Avenue property brings the amount of time spent on rental real estate activities below the amount of time Mr. Kirkpatrick spent working at his law firm.

Accordingly, Mr. Kirkpatrick does not qualify as a real estate professional.

G. The petition of Steven and Judith Kirkpatrick is denied and the notice of deficiency, dated April 5, 2019, is sustained.

DATED: Albany, New York
March 02, 2023

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE